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CENTRAL ILLINOIS PUBLIC SERVICE
COMPANY, d/b/a AmerenCIPS,

Complainant/Counter-Respondent,

vs.

COLES-MOULTRIE ELECTRIC
COOPERATIVE, INC., properly known as
Coles-Moultrie Electric Cooperative,

Respondent/Counter-Complainant.

2005 MAR 10 P 12:38

CHIEF CLERK'S OFFICE

Docket No. 03-0723

**REPLY OF COLES-MOULTRIE ELECTRIC COOPERATIVE
TO THE MOTION BY CENTRAL ILLINOIS PUBLIC SERVICE COMPANY
d/b/a AMERENCIPS TO RECONSIDER THE CIPS MOTION
FOR JUDGMENT ON COUNT I OF THE CIPS COMPLAINT**

COLES-MOULTRIE ELECTRIC COOPERATIVE (Respondent/Counter-Complainant)

(CMEC) (Coles-Moultrie) herewith files its reply to the CENTRAL ILLINOIS PUBLIC
SERVICE COMPANY d/b/a AMERENCIPS (Complainant/Counter-Respondent) (CIPS)
Motion to Reconsider the Motion for Judgment on Count I of the CIPS Complaint and in support
thereof states as follows:

**I. SUPPLEMENTAL FACTUAL AND HISTORICAL BACKGROUND OF THE
DOCKET**

The general statements by CIPS with regard to the Background and Procedural History
for this docket set forth in the CIPS Motion to Reconsider are not complete. Coles-Moultrie
would note the following additional factual docket history:

A. CIPS omits the fact that its initial Complaint filed in this docket consisted not only of
Count I, claiming Coles-Moultrie's Section 7 notice was premature and thus invalid, but Count II

claiming Coles-Moultrie's Section 7 notice did not specify the boundaries of the premises and therefore was invalid; Count III claiming that CIPS had exclusive Section 5 "grandfathered rights" to serve the customer at the premises in question; and Count IV claiming CIPS had the exclusive right by reason of "customer choice" to serve the customer (customer choice is not a putative or substantive claim of right set forth in the Act).

B. Coles-Moultrie answered denying each of the claims of CIPS in Counts I, II, III and IV.

C. Coles-Moultrie filed its Counter-Complaint claiming in Count I the exclusive right pursuant to Section 5 (grandfathered rights) to provide electric service to the customer at the premises; Count II claiming the right pursuant to Section 8 (proximity to Coles-Moultrie's 1965 facilities) to provide electric service to the customer; Count III and Count IV claiming the right to provide electric service pursuant to Section 14(I) and Section 14(iii) respectively of the Act.

D. The CIPS Complaint, Coles-Moultrie's Answer, Coles-Moultrie's Counter-Complaint and the exhibits attached to Coles-Moultrie's Reply and CIPS' Motions contain the only facts that can be considered by the Administrative Law Judge (ALJ) in ruling upon the CIPS Motion for Judgment. CIPS has not filed any affidavit with either its original Motion or Motion for Reconsideration even though CIPS claims in the first full paragraph at page 7 of the CIPS Motion to Reconsider that "...Agracel was and still is in the process of determining the viability of developing the Coles Centre Business Park, part and parcel of which includes the designation of at least a portion of the development as a TIF district". Nothing in any of the pleadings filed by either of the parties supports such statement which is apparently made by CIPS to buttress its claim that the customer, Agracel, Inc., has not even made a determination

about whether it will build the hotel/motel complex in Coles Centre Business Park, which is the subject of the service dispute between Coles-Moultrie and CIPS. Such unsupported claim ignores the following:

1. The CIPS pleadings, Motion for Judgment and Motion to Reconsider Motion for Judgment do not make any claim that Agracel, Inc., the purported customer, has at any time requested electric service from CIPS or that CIPS has provided any proposal to the purported customer for such electric service at the Coles-Centre Business Park (premises).
2. The pleadings reveal that only Coles-Moultrie has responded to Agracel, Inc.'s request for an electric service proposal for Coles Centre Business Park.
3. CIPS requested Todd Thoman of Agracel, Inc. to sign an Affidavit to the effect that the Coles Centre Business Park development was on hold because of litigation over the Mattoon TIF District and would therefore not make a firm request for service (see CIPS March 26, 2004 note and Affidavit to Thoman, responsive to Coles-Moultrie Interrogatory Nos. 5, 8 & 10 attached as Exhibit 1). No signed affidavit to that effect has been produced in this docket. Absent such affidavit, the clear inference is Agracel, Inc. is serious about its proposal/request for electric service.
4. Coles-Moultrie and Agracel, Inc. have executed an electric service Agreement attached hereto as Exhibit 2, negotiated between Agracel, Inc. on behalf of Coles Centre, L.L.C., the Developer, and Coles-Moultrie which Agreement provides that Coles-Moultrie is to provide all of the electric service to Coles Centre Business Park (premises). Thus, the evidence to be considered by the ALJ with regard to the

CIPS Motion for Judgment reveals that, in fact, Agracel, Inc. has executed an electric service Agreement with Coles-Moultrie for the Coles Centre Business Park (premises).

E. CIPS initiated this territorial litigation alleging exclusive Section 5 service rights to the Coles Centre Business Park (premises) and the customer Agracel, Inc., as well as, purported rights based upon customer preference and CIPS still disputes the right of Coles-Moultrie to provide the exclusive electric service to the customer at Coles Centre Business Park (premises). The Motion for Judgment by CIPS declaring the Coles-Moultrie Section 7 notice void does not resolve that issue or answer either Counts III or IV of the CIPS Complaint or Counts I - IV of the Coles-Moultrie Counter-Complaint, both of which have been answered and are at issue.

F. CIPS claims the Commission has no authority to issue declaratory rulings. Yet, CIPS' Motion for Judgment as to Count I of its Complaint requests the Commission to issue a declaratory ruling that the Section 7 notice of Coles-Moultrie is void or otherwise invalid. If the Commission, as CIPS claims, has no authority to issue declaratory rulings, then the Commission cannot render a declaratory ruling on CIPS' Motion for Judgment regarding the validity of the Coles-Moultrie Section 7 notice.

II. A JUSTICIABLE ISSUE REGARDING SERVICE RIGHTS EXISTS PRECLUDING JUDGMENT ON THE PLEADINGS

CIPS claims that the ALJ and Commission can simply assume there is no service dispute here because the customer, Agracel, Inc., has not clearly and undeniably requested

electric service from either Coles-Moultrie or CIPS. Yet, the customer has in fact signed an agreement for electric service from Coles-Moultrie as to the premises in question. Further, it is clear CIPS tried to persuade Agracel, Inc. to state the project was on hold pending litigation between the City of Mattoon and others over the Mattoon TIF District and thus, Agracel, Inc. would not make a firm request for electric service. Agracel, Inc. did not do this leading a reasonable person to the conclusion that Agracel, Inc. is in fact requesting electric service for the "premises" from Coles-Moultrie.

In addition, the CIPS Section 5 and "customer choice" claims and the Coles-Moultrie Section 5, Section 8 and Section 14 claims for service rights are pending. Neither Coles-Moultrie nor CIPS have asked the Commission for leave to withdraw or dismiss the same either with or without prejudice. Consequently, irrespective of what the ALJ and Commission may decide with respect to the CIPS Motion for Judgment as to Count I regarding the Coles-Moultrie Section 7 notice, there will still be pending the substantive claims for service rights to Agracel at the premises in question filed by both CIPS and Coles-Moultrie - and for good reasons given the obvious refusal of Agracel, Inc. to state that there is no "firm" request for electric service and the signing of an electric service agreement between Agracel, Inc. and Coles-Moultrie.

Further, whenever a party moves for judgment on the pleadings, the trier of fact is limited to reviewing the facts as set forth in the pleadings on file, which consist of CIPS' Complaint, Coles-Moultrie's Answer, Coles-Moultrie's Counter-Complaint, CIPS' Motion and Coles-Moultrie's Reply with exhibits. The Motion for Judgment on the pleadings attacks only the legal sufficiency of the Complaint and is permissible only in the absence of any material issue

of fact Richco Plastic Co. v. IMS Company 288 Ill. App. 3d 782; 681 N.E. 2d 56; 224 Ill. Dec. 74, 77 (1st Dist, 5th Div. 1997.) Where, as in this case, material facts (the customer's requests for electric service proposals and negotiation of an electric service Agreement) together with disputed claims of right to provide the electric service are placed in issue by the pleadings, judgment on the pleadings is precluded Opyt's Amoco, Inc. v. Village of South Holland 209 Ill. App. 3d 473; 568 N.E. 2d 260; 154 Ill. Dec. 260, 271-272 (1st Dist. 3d Div. 1991) affirmed on appeal in Opyt's Amoco, Inc. v. Village of South Holland 149 Ill. 2d 265; 595 N.E. 2d 1060; 172 Ill. Dec. 390 (1992).

III. SECTION 7 DOES NOT CREATE ANY SUBSTANTIVE RIGHTS UNDER THE ACT

The only relief sought by the CIPS Motion for Judgment relates to Count I of its Complaint claiming the Coles-Moultrie Section 7 notice is void and of no force and effect. Yet, Section 7 is not a precursor to the filing of a claim under Section 5, Section 8 or Section 14. Precisely, Section 5 does not require any notice to a competing electric supplier before extending service to a customer when the electric supplier believes it has the right to serve by reason of grandfathered Section 5 rights. Likewise, no statutory requirement appears in Section 14 of the Act requiring a Section 7 notice prior to filing a Section 14 claim. In addition, when the electric supplier claims the right to serve by reason of Section 8 (proximity) and if no notice is given under Section 7 prior to the service extension, the specific language of section 7 extends the time period from twenty days to eighteen months within which the competing electric supplier may file a Complaint. Further, the language of Section 7 - which

states that upon an electric supplier filing a Complaint after receiving the Section 7 notice, "...the Commission ...shall proceed to determine the issue as provided in Section 8" - limits Section 7's applicability to Section 8 claims (220 ILCS 30/7). Clearly, Section 7 notices are only contemplated as a procedural act leading to a Complaint before the Commission raising the issue of a territorial dispute between two electric suppliers under Section 8 (proximity) of the Act.

Thus, even if the Section 7 notice is not given or considered premature, an electric supplier is not prohibited from raising a substantive claim of right to provide the electric service in question. The substantive claims of CIPS and Coles-Moultrie to provide electric service to the customer, Agracel, Inc., are the pending issues in the docket, not whether the Section 7 notice is premature or even valid. That issue is frankly moot at this point. The two electric suppliers dispute each others claim of right to provide for the proposed electrical needs of the customer, Agracel, Inc., and the Commission has jurisdiction over those contested claims. The customer's need for service is apparent and the Commission should timely resolve the substantive issue unless CIPS dismisses its Complaint with prejudice.

IV. SECTION 7 IS NOT JURISDICTIONAL

CIPS claims that there is no "request for electric service" because the customer has not determined who the supplier will be. This phrases the argument as one between the customer and the electric supplier as to the need for electric service and places the cart before the horse. The purpose of the Electric Supplier Act is to resolve disputes between electric suppliers, not between electric suppliers and customers, except in the limited circumstances of Section 9

which is not relevant to the instant docket. CIPS claims that Agracel, Inc. has not determined that Coles-Moultrie will be the electric supplier for the Coles Centre Business Park. However, the signed electric service agreement should clearly evidence that Agracel, Inc. has, in fact, chosen Coles-Moultrie to be the electric supplier for the premises to which electric service is in dispute in this docket.

CIPS further contends that the customer's situation is still tentative because the customer has not worked out TIF financing arrangements and therefore, the Section 7 notice is a "corn field" notice. It is hard to tell where such a characterization comes from. There is, however, no evidence in this docket that TIF financing arrangements are a precondition to the customer's determination as to who the electric supplier will be for the Coles Centre Business Park. It is the customer, Agracel, Inc., who has initiated the request for proposals for electric service from Coles-Moultrie and it is the customer who has made the determination that it wishes to have Coles-Moultrie provide that electric service. The customer is the one who is in charge of the investment and construction of the complex at Coles Centre Business Park. It is the customer who has the need for the electric service. It is apparent, to even the most naive person, that electric service will be needed during construction. It is also apparent that any person contemplating construction of a hotel/motel complex, such as is involved in this docket, would want to have all of the items required for construction, including electric service providers, resolved prior to the start of construction so that issue cannot cause subsequent delays. It is further obvious, from the foregoing, that this is exactly what the customer is attempting to do in the instant docket and that the customer has, in fact, made its determination as to the electric supplier.

Apparently, CIPS has not acquiesced in that determination, because CIPS still maintains its Complaint for Section 5 service rights in this docket. As a result, if the ALJ were to grant the CIPS Motion for Judgment as to Count I and also grant the CIPS request to dismiss this docket for lack of jurisdiction, even though there is no appropriate pleading providing any basis for such dismissal now pending before the ALJ, Coles-Moultrie and the customer would be left with a situation in which CIPS disputes the right of Coles-Moultrie to provide electric service to the customer at Coles Centre Business Park without a way to resolve the dispute. When construction begins and electric service must be constructed, Coles-Moultrie will be faced with the obligation of incurring the capital investment for installing extensive electric service for the Coles Centre Business Park, which investment will be in jeopardy by reason of the latent claim of CIPS to be the electrical provider. While the Act grants the Commission authority to issue a Temporary Order for providing electric service to the customer, in order to expedite construction of facilities to the customer, such a Temporary Order has no effect upon a final determination as to the electric supplier for the premises. Accordingly, the Temporary Order does not solve the problem created by CIPS' dormant claim to be the electric supplier to the Coles Centre Business Park and still leaves Coles-Moultrie's electrical infrastructure investment in jeopardy. Of course, Coles-Moultrie can take a "hands off" attitude towards the customer's desire to have Coles-Moultrie provide the electric service. But, to do so leaves the customer in a quandary at a time when the customer is attempting to provide as much certainty as possible for the hotel/motel complex development. In essence, the only way to achieve the "certainty" desired by the customer with regard to who its electric supplier will be for the Coles Centre Business Park is to deny the Motion for Judgment by CIPS and to deny the

request by CIPS to dismiss the docket for lack of jurisdiction.

Should the Commission retain jurisdiction of this docket and the respective claims of Coles-Moultrie and CIPS to be the exclusive service provider to the Coles Centre Business Park, there will be a period of time whereby the parties will be completing their discovery, filing prepared testimony and otherwise preparing for hearing in this matter. As a practical matter, that period of time will encompass at least 90 to 180 days during which CIPS and Coles-Moultrie will incur the trial preparation work. There is little downside to the Commission retaining jurisdiction. At the same time retaining jurisdiction will lead to an early decision as to the appropriate electric supplier for the premises in question, which will encourage the chosen electric supplier to provide the necessary capital investment for installation of the electric infrastructure. This will, in turn, lead to the certainty that the customer/investor desires for the project.

Granting the CIPS Motion leaves open the question of the appropriate electric supplier, which will not be helpful for development of the complex. When the electric infrastructure is installed someone will have to pay for the installation, be it Coles-Moultrie or the customer, which cost will be at risk. This does not comply with one of the purposes of the Electric Supplier Act, that is, to minimize the inconvenience and inefficiency in electric service caused by disputes between electric suppliers. It would be appropriate to handle the case in a manner that reduces the risk of these occurrences. Thus, the CIPS motion should not be granted.

V. CIPS IMPROPERLY SEEKS A DECLARATORY RULING BY THE ILLINOIS COMMERCE COMMISSION REGARDING THE PROPER INTERPRETATION OF SECTION 7 OF THE ILLINOIS ELECTRIC SUPPLIER ACT

The Commission has no authority to interpret Section 7 for CIPS, particularly in the abstract, without benefit of all the facts regarding the need for electric service by Agracel, Inc. Resource Technology Corp. v. Commonwealth Edison Co 343 Ill. App. 3d 36; 795 N.E. 2d 936; 277 Ill. Dec.268 (1st Dist 3d Div. 8-6-03); Harrisonville Telephone Co. v. Illinois Commerce Commission 176 Ill. App. 3d 389; 531 N.E. 2d 43; 125 Ill. Dec. 864, 866 (5th Dist. 1988). Under the limited provisions of Rule 200.220 of the Commission Rules of Practice, declaratory rulings can only be given regarding the applicability of Section 7 to CIPS. We already know Section 7 is applicable to CIPS because CIPS is an electric supplier as defined by Section 30/3.5 of the ESA. However, CIPS is requesting the Commission to interpret the meaning of Section 7 regarding when notice should be given and in so doing to establish a bright line test consisting of a written agreement between the customer and the electric supplier. Such an interpretation would be in the abstract, no less, and not authorized by Rule 200.220.

In addition, the CIPS interpretation that there must be both an offer and an acceptance by the customer and supplier before there is a need for the Section 7 notice would ignore the clear and definite language of the statute regarding notice of the "...proposed construction, extension or service...". There in fact has now been such an offer and acceptance. However, such interpretation would render the aforesaid language meaningless, would defeat the public policy established by Section 7 to encourage early resolution of electric supplier service disputes for customers, would delay the time when the issue could be brought before the Commission for resolution, and would not further the interests of the customer. In addition, such an interpretation

of Section 7 would be contrary to proper statutory interpretation which requires that all words of the statute be given meaning and that no term be rendered superfluous or meaningless, Bonaguro v. County Officers Electoral Board 158 Ill. 2d 391; 634 N.E. 2d 712; 199 Ill. Dec. 659, 661-662 (1994). Further, contrary to proper statutory interpretation and the holding in Trigg v. Sanders 162 Ill. App. 3d 719; 515 N.E. 2d 1367; 114 Ill. Dec. 96, 101-102 (4th Dist. 1987) cited by CIPS, such an interpretation would graft upon Section 7 the specific requirement of an “offer and acceptance” for electric service between a customer and an electric supplier as a precondition to a Section 7 notice. Such would be contrary to the general language of Section 7.

VI. THE CIPS AUTHORITY DOES NOT SUPPORT THE POSITION PROPOSED BY CIPS

In Coles-Moultrie’s initial Reply to the CIPS Motion, Coles-Moultrie noted the CIPS authority does not support the position taken by CIPS with respect to Section 7. The cases of Illinois Municipal Electric Agency v. Illinois Commerce Commission 247 Ill. App. 3d 857; 617 N.E. 2d 1363; 187 Ill. Dec. 642 (4th Dist. 1993) and Resource Technology Corporation v. Commonwealth Edison Co. 343 Ill. App. 3d 36; 795 N.E. 2d 936; 277 Ill. Dec. 268 (1st Dist. 3rd Div. 2003) hold that even though the Commission has adopted Administrative Rule 200.220 authorizing the Commission to issue declaratory rulings, the Commission cannot issue a declaratory ruling regarding the interpretation of a provision of the ESA and certainly cannot do so absent a complete and thorough disclosure of facts. Likewise, Illinois Power Co. v. Illinois Commerce Commission 39 Ill. 2d 406; 235 N.E. 2d 614 (1968) held the Section 7 notice was not premature even though at the time of the hearing no development had taken place and the

customer requested service at different times from both suppliers. Likewise, CIPS relies upon Lihosit v. State Farm Mutual Automobile Insurance Co. 264 Ill. App. 3d 576; 636 N.E. 2d 625; 201 Ill. Dec. 193 (1st Dist. 2d Div. 1993) for the proposition that there is no justiciable issue in this docket. Yet, in Lihosit the Plaintiff requested declaratory judgment with regard to whether or not Plaintiff would have to pay for arbitrators used to determine an uninsured motorist claim under Plaintiff's insurance policy even though the Defendant insurance company admitted it would pay for the arbitrators, thereby mooted the issue. In this docket CIPS has not agreed Coles-Moultrie is the appropriate electric supplier to Agracel, Inc. Thus, there is a justiciable issue regarding the appropriate electric supplier to the customer, Agracel, Inc, which is not moot. The case of Illinois Industrial Energy Consumers' Request for Declaratory Ruling Pursuant to 200.220 Re: Section 16-102 of an Act entitled "Electric Service Customer Choice and Rate Relief Law of 1997" Ill. Comm. Com. 98-0607 (March 10, 1999) is not applicable because the limited facts before the ALJ reveal there is an actual controversy regarding which electric supplier should provide the electric service to the customer in question and that controversy has been initiated, not by Coles-Moultrie, but by CIPS. Likewise, Methodist Medical Center v. Taylor 140 Ill. App. 3d 713; 489 N.E. 2d 351; 95 Ill. Dec. 130 (3d Dist. 1986) does not aid CIPS because no new rights will be established under Section 7 when the Commission makes a determination under Section 5, 8 or 14 of the Act as to which electric supplier is appropriate to serve the customer. Rather, if the Commission adopts CIPS' position with regard to the Section 7 notice, then a Section 7 notice would never be given and the dispute could never be brought to the Commission's attention until a binding contract has been entered into between the customer and the electric supplier regarding the construction of and providing of electric service. Such an

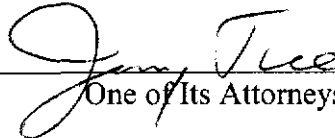
interpretation would limit the Commission's jurisdiction under the Act and is and was not the intent of Section 7 and the notice provisions provided for therein. In effect, the interpretation of Section 7 urged by CIPS would create new rights attendant to Section 7 by limiting the availability of the Section 5, Section 8, and Section 14 substantive claims.

WHEREFORE, Coles-Moultrie Electric Cooperative requests the following relief from the Illinois Commerce Commission:

- A. To deny the Motion for Reconsideration of the Motion for Judgment with respect to Count I of the CIPS Complaint.
- B. To dismiss Count I of the CIPS Complaint with costs to be assessed against CIPS.
- C. For such other and further relief as the Commission deems just and equitable.

Respectfully submitted,

COLES-MOULTRIE ELECTRIC
COOPERATIVE, INC.,

By:  _____
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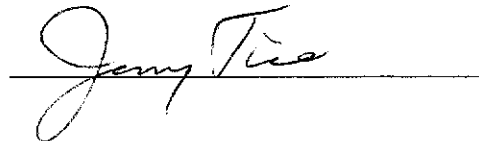
PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the 9th day of March, 2005, I deposited in the United States mail at the post office at Petersburg, Illinois, postage fully paid, a copy of the document attached hereto and incorporated herein, addressed to the following persons at the addresses set opposite their names:

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A handwritten signature in cursive script, reading "Jerry Tice", is written over a horizontal line.

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